ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED
NOV 16 2007
Federal Communications Commission
Office of the Secretary

In the Matter of	)	
	)	
United Telephone Company of Kansas	)	
United Telephone Company of Eastern Kansas	)	
	)	
and	)	
	)	
Twin Valley Telephone, Inc.	)	CC Docket No. 96-45
	)	
Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules.	)	
	)	
Petition for Clarification or Waiver of Section 54.305 of the Commission's Rules	)	

NOTICE OF REFERRAL

I. INTRODUCTION AND SUMMARY

On October 15, 2007, the federal District Court for the District of Kansas entered a Memorandum and Order in a dispute between Twin Valley Telephone, Inc. ("Twin Valley") and the Universal Service Administrative Company ("USAC") and the National Exchange Carrier Association ("NECA").[1] In this Memorandum and Order, a copy of which is attached as Appendix 1, the district court referred to the Commission on primary jurisdiction grounds the question of when the waivers granted in the Commission's September 11, 2006 Order in this

[1] *Twin Valley Telephone, Inc. v. Universal Service Administrative Co., et al.*, Civil Action No. 07-2172-CM, 2007 U.S. Dist. LEXIS 76893 (D. Kan. Oct. 15, 2007) ("District Court Order").

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proceeding were effective.[2] Based upon a plain reading of the *Waiver Order* and consistent with the purpose of and relationship between the rules that the Commission waived, Twin Valley submits that the waivers were effective on March 1, 2006, and the Commission should promptly enter an order to that effect in response to the district court's referral.

II. FACTUAL BACKGROUND

In the fall of 2005, United Telephone Company of Kansas and the United Telephone Company of Eastern Kansas (collectively, "Sprint") agreed to sell to Twin Valley all of the assets used to provide telephone service in thirteen Kansas telephone exchanges (the "Sale").[3] Consistent with Commission rules, Sprint and Twin Valley jointly filed on October 3, 2005, a Domestic Section 214 Application For Transfer of Control with the Commission, seeking approval of the Sale.[4] Three months later, on January 3, 2006, the Commission approved the Sale, finding that it was in the public interest.[5] Having obtained the primary regulatory

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[2] *See United Telephone Co. of Kansas, United Telephone Company of Eastern Kansas, and Twin Valley Telephone, Inc., Joint Petition for Waiver of the Definition of "Study Area" contained in Part 36 of the Commission's Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules*, Order, 21 FCC Rcd 10111 (2006) ("*Waiver Order*").

[3] Ten of the thirteen exchanges (Clifton, Clyde, Delphos, Glasco, Leonardville, Longford, Milford, Olsburg, Riley, and Wakefield) were owned by the United Telephone Company of Kansas. The remaining three exchanges (Aurora, Green and Morganville) were owed by the United Telephone Company of Eastern Kansas.

[4] 47 U.S.C. § 214; 47 C.F.R. §§ 63.03 – 63.04.

[5] Notice of Streamlined Domestic Section 214 Application Granted, Public Notice, WC Docket No. 05-30, 21 FCC Rcd. 3 (2006). The Kansas Corporation Commission approved the transfer on November 21, 2005, Order and Certification, Docket No. 06-TWVT-116-COC.

approvals required for the Sale, Sprint and Twin Valley proceeded to close the Sale effective March 1, 2006 (the "Closing Date").[6]

In connection with the Sale, Sprint and Twin Valley also filed on October 26, 2005 a "Joint Petition for Expedited Waiver" requesting a waiver of: (1) the "study area boundary freeze rule" to allow Sprint to remove the thirteen exchanges from its "study area" and permit Twin Valley to add the exchanges to its "study area";[7] and (2) Rule 69.3(e)(11), which prohibits an acquiring telephone company from participating in the NECA tariff until the July 1st following the sale.[8] Because telephone companies receive universal service support based on the territories in their "study area," it was essential to remove these exchanges and Universal Service Fund ("USF") payments from Sprint and add these exchanges and USF payments to Twin Valley.

The Commission did not, however, take action on the waiver petition until September 11, 2006. *See Waiver Order.* In the *Waiver Order*, the Commission found good cause to allow Sprint and Twin Valley to alter their existing "study areas" and to waive the July 1st date for adding newly-acquired exchanges to the NECA tariffs. *See Waiver Order* at ¶¶ 6, 11. The Commission noted that NECA had submitted a letter stating that it had no objection to including the new exchanges acquired by Twin Valley prior to the July 1st date, because it would not create a burden for NECA. *Id.* ¶ 10 n.32. The Commission also noted that Twin Valley's express

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[6] Sprint and Twin Valley closed the sale in three phases, the last of which occurred on March 7, 2006, although the sale of the majority of the exchanges was completed on March 1, 2006, which is considered the Closing Date for purposes of the transaction.

[7] On November 15, 1984, the Commission issued a rule freezing the geographic boundaries of every incumbent telephone company's study area. The Commission's freeze is now codified in the definition of "study area" set forth in the Appendix to Part 36-Glossary at the end of Chapter 47 of the Code of Federal Regulations.

[8] 47 C.F.R. § 69.3(e)(11). Thus, if an acquiring company wishes to include its newly-acquired exchanges in the NECA tariffs effective on the closing of its acquisition, rather than the following July 1st, the acquiring telephone company must obtain a waiver from the Commission.

request that the waiver of Rule 69.3(e)(11) be made effective upon the closing date of its acquisition. *Id.* ¶ 10. The Commission then ordered that the petitions for waiver be "granted," without condition, exception or exclusion. *Id.* ¶¶ 18-19.[9]

Instead of recognizing Twin Valley's new "study area" as of the Closing Date of March 1, 2006, both NECA and USAC did not recognize the study area waiver until September 11, 2006, the date the *Waiver Order* was adopted and released. Consequently, Twin Valley was denied participation in the NECA Tariff and Interstate cost recovery from the NECA pool for approximately six months, even though it owned and operated the exchanges acquired from Sprint during that time. Additionally, USAC only made USF support payments to Twin Valley for the newly-acquired exchanges after September 11, 2006. Between the Closing Date and September 11, 2006, USAC gave Sprint credit for USF support payments for the thirteen exchanges it no longer owned. During this period, Twin Valley invested significant amounts of money to upgrade the telephone services provided to the thirteen exchanges, in reliance upon receipt of USF funds. To rectify this inequity, Twin Valley promptly sent a letter to USAC on September 22, 2006, requesting USF payments from March 1, 2006 and providing USAC with the technical information it needed to calculate those payments. USAC refused to comply with Twin Valley's letter request, insisting instead that Twin Valley would not be entitled to receive USF payments for the thirteen exchanges from March 1, 2006 unless and until the Commission

[9] Twin Valley also requested clarification or, if necessary, a waiver of Rule 54.305 regarding the calculation of universal service support for its transferred exchanges. The Bureau denied this request, *Waiver Order* ¶¶ 12-15, and Twin Valley filed an application for review of the Bureau's decision with the Commission on October 10, 2006. The application for review is pending before the Commission, and the proper interpretation of Rule 54.305 was not before the federal district court and is not the subject of the court's primary jurisdiction referral.

"clarified" that Twin Valley should receive USF support payments for the thirteen exchanges "retroactive" to that date.[10]

Twin Valley subsequently filed suit against USAC and NECA in federal district court in Kansas, seeking injunctive relief to require compliance with the *Waiver Order* approving the waiver of Rule 69.3(e)(11) and study area freeze waiver effective on the Closing Date. NECA filed a motion to refer the case to the Commission on primary jurisdiction grounds, while USAC moved to dismiss the complaint on grounds of primary jurisdiction and the alleged failure of Twin Valley to exhaust administrative remedies. The district court granted NECA's motion, finding it appropriate to stay Twin Valley's complaint and "refer the case to the FCC for clarification of its order as to whether the waivers granted apply retroactively to the closing date." District Court Order at 9. The district court denied USAC's motion to dismiss. *Id.*

III. DISCUSSION

No serious dispute exists that Sprint and Twin Valley requested and the Commission granted a waiver of Rule 69.3(e)(11) effective March 1, 2006, which was the "closing date of the acquisition." The waiver petition plainly requested that the Commission grant Twin Valley a waiver of Rule 69.3(e)(11) to the extent necessary for it to add the thirteen newly-acquired exchanges "to its current study area" and include them in the NECA tariff "upon the closing date of this acquisition." Petition at 7-8. The *Waiver Order* noted that the requested waiver "would

[10] In an abundance of caution, Twin Valley initially filed a Petition for Clarification with the Commission. However, upon further research, and because the language of the Commission's *Waiver Order* is clear, Twin Valley subsequently filed a request to withdraw its Petition for Clarification, which the Commission granted on May 25, 2007. *United Telephone Co. of Kansas, United Telephone Company of Eastern Kansas, and Twin Valley Telephone, Inc., Joint Petition for Waiver of the Definition of "Study Area" contained in Part 36 of the Commission's Rules; Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules*, Order, 22 FCC Rcd 9442 (2007).

enable Twin Valley to include the acquired access lines in the NECA carrier common line tariff *upon the closing date* of its acquisition transaction with United." *Waiver Order* ¶ 10 (emphasis added). The Commission granted Twin Valley's request for a waiver of Section 69.3(e)(11), and nothing in the *Waiver Order* can reasonably be read to suggest that waiver was granted effective on any date other than March 1, 2006, the "closing date" of Twin Valley's acquisition of the exchanges from Sprint.

Thus, the only question that remains is whether the Commission's waiver of the study area freeze also was effective "upon the closing date" of the acquisition. The answer to this question is clearly "yes."

First, the waiver of Rule 69.3(e)(11) and the waiver of the study area freeze are inextricably intertwined. This relationship is plain from the waiver petition in which Twin Valley sought "to add [the thirteen Sprint] exchanges *to its current study area* and include them in the NECA pools *upon the closing date of this acquisition.*" Petition at 7-8 (emphasis added). The only way for Twin Valley to add the newly acquired Sprint exchanges "to its current study area" and include them in the NECA tariffs "upon the closing date of this acquisition" is if the waivers of Rule 69.3(e)(11) and the study area freeze were both effective as of March 1, 2006. It would have done little good for Twin Valley to obtain a waiver of Rule 69.3(e)(11) effective as of March 1, 2006 and not obtain a waiver of the study area freeze effective that same date.

Second, the structure of universal service support for incumbent local exchange carriers presumes that the composition of the study area and the requirements of Part 69 work in parallel. It would be inconsistent with the Commission's regulatory regime to include the lines in Twin Valley's study area and the NECA pools on one date (March 1, 2006), but not provide universal service support until a date some six months later (September 11, 2006). The Commission

previously recognized as much in its order adopting Rule 69.3(e)(11), noting that "the study area is a basic construct of our regulatory structure ...."[11] According to the Commission, "given the importance of study areas to our regulatory framework," the rules it was adopting, including Rule 69.3(e)(11), "relate only to complete study areas," which includes the redefined study area "approved pursuant to our waiver proceeding under Part 36 to alter the boundaries of a frozen study area."[12]

Third, failure to waive the study area freeze effective with the closing date of the acquisition of the thirteen Sprint exchanges by Twin Valley would produce an absurd result. Under no circumstances should a seller continue to include exchanges in its study area for which it has no costs, while the buyer is prevented from including in its study area exchanges it actually serves, as the Commission previously has recognized.[13] However, that has been the outcome in Twin Valley's case to date; USAC has failed to transfer USF payments to Twin Valley effective with the closing date of the transaction with Sprint and instead has given Sprint a credit for USF payments for the thirteen exchanges it no longer owns.

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[11] *Amendment of Part 69 of the Commission's Rules Relating to the Common Line Pool Status of Local Exchange Carriers Involved in Mergers or Acquisitions*, CC Docket No. 89-2, Report and Order, 5 FCC Rcd. 231, ¶ 44 (1989).

[12] *Id.* ¶ 44, n. 52.

[13] *Amendment to Part 36 of the Commission's Rules and Establishment of a Joint Board,* Notice of Proposed Rulemaking, 5 FCC Rcd. 5974, ¶ 17 (1990) (noting that "if carrier A sells an exchange to carrier B, and we insist on maintaining the frozen study area boundaries, carrier A's study area would include costs for an exchange it no longer owns and carrier B's study area would not include costs for an exchange it does own"). The Commission also noted that "study area" waivers should be granted expeditiously, suggesting that 60 days was an appropriate amount of time for granting such waivers. *Id.* ¶ 19. In this case, the Commission did not grant Twin Valley's "study area" waiver for nearly 12 months. Had the Commission acted within 60 days, it would have granted Twin Valley's waiver petition well before the closing of the transaction with Sprint.

The effect has been that Twin Valley has invested significant amounts of money to upgrade the telephone services provided to these thirteen exchanges without receiving the benefit of USF support payments. At bottom, if the lines are in a rural incumbent LEC's study area and in the NECA carrier common line tariff and pool effective on the date of closing, it is illogical to treat those lines differently for universal service support purposes. This is particularly true given that universal service support is merely a modified form of recovery of what historically has been recognized as carrier common line costs.[14]

This interpretation of the *Waiver Order* also is most consistent with the Commission's efforts and policies designed to expedite uncontested Section 214 license transfers. Because the Section 214 application is typically granted well before the determination of a waiver request, as was the case here, a contrary interpretation of the *Waiver Order* would undercut the Commission's efforts to speed resolution of Section 214 license transfer applications. In this case Sprint and Twin Valley were authorized to transfer the thirteen exchanges six weeks after the public notice. Even comparatively small transactions such as the one involving Sprint and Twin Valley are legally and financially complex, and once they become public, involve expectations of the affected subscribers. It is therefore often a business necessity to close such sales as soon as permitted by regulators to do so in order to avoid the potential development of financial or other complications that could make the closing of the transaction difficult if not impossible.

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[14] *See generally Multi-Association Group ("MAG") Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carries and Interexchange Carriers*, Order and Second Order on Reconsideration, CC Docket No. 00-256, 17 FCC Rcd. 11593 ¶¶ 4-5 (2002).

Furthermore, the public interest was advanced through the closing of the transaction as soon as possible because Twin Valley immediately began providing the infrastructure necessary to provide broadband services to customers in the acquired exchanges.[15] By the time the *Waiver Order* was issued by the Commission six months after the closing, Twin Valley had installed equipment in the acquired exchanges that allowed the provision of broadband services to numerous customers in the acquired exchanges.[16] Had Twin Valley waited to close the transaction until it had received the study area waiver, it would have taken many more months until broadband services were available to rural customers in Kansas.

Nevertheless, if the Waiver *Order* is construed in such a way that the study area freeze waiver is effective as of the date of the *Waiver Order* (September 11, 2006) rather than the date of the closing (March 1, 2006), it would create a substantial gap (from March 1, 2006 to September 1, 2006) during which neither universal service support would be paid to Twin Valley for the lines in the acquired exchanges, and the lines in those exchanges would not participate in the NECA pools. This gap would result in a loss to Twin Valley of approximately $150,000 in USF support and $750,000 due to the inability to include the costs and revenues in the NECA pools. This loss of revenue would harm both Twin Valley and consumers in the acquired

[15] Broadband services may not be directly supported by federal universal service. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order and Order on Reconsideration, 18 FCC Rcd 15090 ¶ 13 (2003). However, consistent with the Commission's view that its policies should "not impede the deployment of modern plant capable of providing access to advanced services," universal service support may be used to fund the deployment of an integrated network "used to provide both supported and non-supported services." *Id.* (quoting *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256, Fourteenth Report and Order, Twenty Second Order on Reconsideration, 16 FCC Rcd 11244 ¶ 200 (2001).

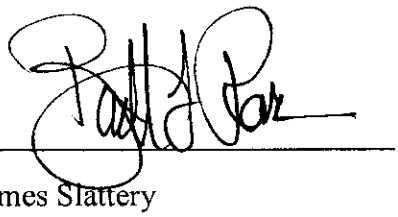
[16] By September 11, 2006, Twin Valley had expended over $10 million to upgrade facilities.

exchanges, and Twin Valley's ability to provide services, including broadband, to customers in the acquired exchanges would be adversely affected.

IV. CONCLUSION

For the foregoing reasons, the Commission should find that both the waiver of Rule 69.3(e)(11) and the waiver of the study area freeze were effective as of March 1, 2006.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November 2007, a true and correct copy of the foregoing Notice of Referral was sent via hand-delivery, or overnight mail (indicated by *), to the following:

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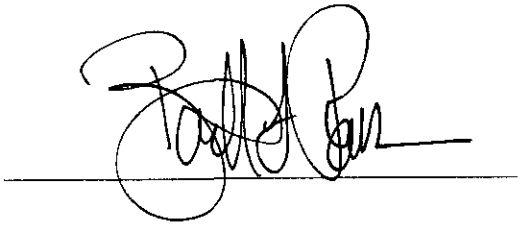

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APPENDIX 1

N THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TWIN VALLEY TELEPHONE, INC.,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 07-2172-CM**
UNIVERSAL SERVICE ADMINISTRATIVE COMPANY and NATIONAL EXCHANGE CARRIER ASSOCIATION,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Plaintiff brings this action seeking declaratory judgment and specific performance of an order entered by the Federal Communications Commission ("FCC"). The FCC's order granted plaintiff waivers of certain requirements related to a transaction between plaintiff and two other telephone companies. Plaintiff claims that the FCC's order authorized retroactive waivers. According to plaintiff, defendants—who are not-for-profit corporations established by the FCC to administer the federal Universal Service Fund and the FCC's access charge plan—have improperly recognized the waivers only as of the date of the FCC's order. The case is before the court on three motions: Motion to Dismiss by Universal Service Administrative Company (Doc. 9); Motion of Defendant National Exchange Carrier Association to Refer Case to the Federal Communications Commission and Stay District Court Proceedings (Doc. 11); and Motion for Leave to File Sur-Reply (Doc. 24).

The court first takes up defendant National Exchange Carrier Association's ("NECA") motion to refer the case to the FCC and stay proceedings. Defendant NECA argues that the FCC has

primary jurisdiction over the claims in this case and that the court should refer the case to the FCC to allow the parties to seek an administrative ruling.

"'Primary jurisdiction is invoked in situations where the courts have jurisdiction over the claim from the very outset but it is likely that the case will require resolution of issues which, under a regulatory scheme, have been placed in the hands of an administrative body.'" *Mical Commc'ns, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1038 (10th Cir. 1993) (quoting *Marshall v. El Paso Nat. Gas Co.*, 874 F.2d 1373, 1376 (10th Cir. 1989)). The primary jurisdiction doctrine serves two purposes: to promote regulatory uniformity and utilize agency expertise. *See S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 751 (10th Cir. 2005). To this end, before courts invoke the doctrine and refer matters to administrative agencies, they should consider whether issues of fact (1) fall outside conventional judicial experiences; (2) require administrative discretion; or (3) "require uniformity and consistency in the regulation of the business entrusted to a particular agency." *Mical Commc'ns, Inc.*, 1 F.3d at 1038 (internal quotation marks and citations omitted). Other Circuits evaluate these three factors, as well as a fourth factor—whether the plaintiff has made a prior application to the agency. *See, e.g., Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 295 (2d Cir. 2006); *cf. TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1239 (10th Cir. 2007) ("Additionally, when the regulatory agency has actions pending before it which may influence the instant litigation, invocation of the doctrine may be appropriate."). Courts do not apply a "fixed formula . . . for applying the doctrine." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). At least one Circuit also balances the advantages of invoking the doctrine with the potential costs associated with administrative proceedings, including delays. *See, e.g., Nat'l Commc'ns Ass'n, Inc. v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 223 (2d Cir. 1995) (citing *Ricci v. Chicago Mercantile Exch.*,

409 U.S. 289, 321 (1973) (Marshall, J., dissenting)). Another Circuit has indicated that the case for recognizing primary jurisdiction may be stronger in a declaratory judgment action for two reasons: (1) a court has discretion whether to hear an action for declaratory judgment, and (2) such actions should not be used "'to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal.'" *Allnet Commc'n Serv., Inc. v. Nat'l Exch. Carrier Ass'n, Inc.*, 965 F.2d 1118, 1121 (D.C. Cir. 1992) (citation omitted).

When the court determines in its discretion that the primary jurisdiction doctrine applies, "the judicial process is suspended pending referral of the issues to the administrative body for its views." *Marshall*, 874 F.2d at 1377. "The doctrine does not require that all claims within an agency's purview be decided by the agency. Nor is it intended to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." *Brown v. MCI Worldcom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002).

Before evaluating the factors, the court must identify the issue(s) pending before the court. *See TON Servs., Inc.*, 493 F.3d at 1239–40. Broadly speaking, there is only one issue before the court: Does the FCC's order require that plaintiff's waivers apply from the date of closing or that they apply from the date of the FCC's order? The issue is analogous to a basic contract interpretation issue, although a contract is not directly involved here.

The issue before the court is not one that is so technical that it falls outside conventional judicial experiences. To the contrary, the issue is similar to ones that this court faces regularly. Most cases referred to the FCC under the primary jurisdiction doctrine involve challenges to the reasonableness and adequacy of tariffs, technical questions that should be reviewed by the FCC. *See, e.g., Allnet Commc'n Serv., Inc.*, 965 F.2d at 1121; *see also Himmelman v. MCI Commc'ns Corp.*, 104 F. Supp. 2d 1, 5–7 (D.D.C. 2000). This case involves interpretation of an FCC order.

The difference between this case and an ordinary contract interpretation case is that in this instance, the court would be interpreting what an *agency* meant—not what parties meant. The FCC is in the best position to interpret its own ruling. Moreover, whether the FCC intended for the waivers to apply retroactively or upon the effective date of its order implicates important policy considerations. The FCC, not this court, is charged with making regulatory policy. The first factor weighs slightly in favor of invoking the primary jurisdiction doctrine, even though it differs in nature from most cases referred to the FCC.

The second factor also weighs in favor of invoking primary jurisdiction. The FCC's administrative discretion is involved in whether the FCC wants defendants to recognize waivers retroactively or as of the date of the FCC's order. The FCC's "[e]xpertise . . . is not merely technical but extends to the policy judgments needed to implement an agency's mandate." *Allnet Commc'n Serv., Inc.*, 965 F.2d at 1120.

The third factor is the most persuasive one to the court. Uniformity and consistency are critical in FCC decisions—otherwise, rival carriers may be subject to different rules and one may be placed at a competitive advantage over another. The FCC has at least one other similar case pending before it. The FCC should be given the opportunity to clarify its own order in a way that will treat all carriers fairly and equally. In evaluating this factor, the court has considered plaintiff's position that any risk of inconsistent decisions is speculative. But the court is not persuaded that different courts should be interpreting orders drafted by the FCC using its expertise on regulatory matters. Again, one of the key purposes of the primary jurisdiction doctrine is to promote regulatory uniformity. *See S. Utah Wilderness Alliance*, 425 F.3d at 751.

The court also notes that plaintiff filed a petition for clarification before the FCC, albeit at defendants' urging. In that petition, plaintiff raised the same issue now before this court. Although

plaintiff withdrew the petition for clarification when it filed this case (over six months after it filed the petition), the fact that plaintiff first-filed the petition suggests that the FCC is the proper authority to resolve this issue. The court does not rely substantially on this inference, but finds it worth mentioning.

To the extent that the court should consider delays and other costs that might arise from referring this case to the FCC, the court has little before it on which to base such analysis. Plaintiff mentions that the FCC took nearly a year to rule on plaintiff's application for the waivers, but the FCC approved plaintiff's application for transfer of the assets used to provide telephone services in three months. The court recognizes that plaintiff would like a prompt resolution of this issue, but the court will not assume that the FCC will unduly delay in reviewing plaintiff's claim. Any additional delay is, to some extent, attributable to plaintiff's choice to withdraw its petition with the FCC and seek relief in this court.

Finally, this suit is a declaratory judgment action. As noted above, at least one Circuit has said that the discretionary nature of a court's jurisdiction over declaratory judgment actions supports invocation of the primary jurisdiction doctrine. *See, e.g., Allnet Commc'n Serv., Inc.*, 965 F.2d at 1121.

Considering all of these factors, the court concludes that it is appropriate to stay this action and refer the case to the FCC for clarification of its order as to whether the waivers granted apply retroactively to the closing date. The court realizes that defendant Universal Service Administrative Company asks the court to dismiss the action based on the primary jurisdiction doctrine. Because the relief sought in this case depends on the interpretation of the FCC's order, this case presents an instance where dismissal could be appropriate. *See TON Servs., Inc.*, 493 F.3d at 1243 ("Where, for example, the relief sought is an injunction or declaratory judgment, dismissal may be appropriate.").

But the parties have not discussed the potential prejudice that could be suffered in the event of a dismissal and defendant NECA only sought a stay of proceedings. The court finds it more appropriate to stay this action than to dismiss it at this time.

Based on the court's ruling on defendant NECA's motion to stay, the court denies the motion to dismiss and motion to file a surreply as moot. The court suspects that they will remain moot after the FCC's ruling, but if they are not, the parties may refile their motions when the stay is lifted.

IT IS THEREFORE ORDERED that the Motion of Defendant National Exchange Carrier Association to Refer Case to the Federal Communications Commission and Stay District Court Proceedings (Doc. 11) is granted.

IT IS FURTHER ORDERED that the Motion to Dismiss by Universal Service Administrative Company (Doc. 9) and the Motion for Leave to File Sur-Reply (Doc. 24) are denied without prejudice as moot.

Dated this 15th day of October 2007, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge